

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: : 03-MD-1570 (GBD)
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TERRORIST ATTACKS OF : 500 Pearl Street
SEPTEMBER 11, 2001 : New York, New York
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: December 13, 2019
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE SARAH NETBURN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE COURT: Hi, this is Judge Netburn. Who do I have
2 on the phone?

3 MS. FLOWERS: Hi, Judge Netburn. This is Jodi
4 Flowers. Good afternoon.

5 THE COURT: Good afternoon.

6 MS. FLOWERS: I've also got John Eubanks from my
7 office here.

8 THE COURT: Thank you.

9 MS. BENETT: Hi, Judge.

10 THE COURT: Hi.

11 MS. BENETT: Hi, Judge. It's Megan Benett and Andrew
12 Maloney from Kreindler and Kreindler. Hi.

13 MR. MALONEY: Good afternoon, Your Honor.

14 MS. SMITH: Hi, Judge. This is Samantha Smith from
15 Anderson Kill.

16 THE COURT: Great. I have you here with my new law
17 clerk, Joshua, on the case and I'm recording the call so if
18 anyone wants to make a transcript you can request that a
19 transcript be made, but I don't have a court reporter here.
20 Because of that, if everybody can introduce themselves before
21 they speak so that we're assured to attribute the appropriate
22 person to each statement.

23 So I wanted to follow up on the letter that you
24 submitted regarding the future and specifically with respect to
25 the victims fund. I'm less concerned, as I indicated in my

1 order, with the first three categories of cases, the estate
2 wrongful death claims, the immediate family member solatium
3 claims and the functional equivalent claims. I am concerned
4 about the personal injury claims given that there was some
5 suggestion that it might be, by my read of the letter but maybe
6 I'm misreading it, as few as 17,000 and potentially
7 significantly more. I realize in your follow-up letter you
8 said that there may be some changes and so now you think the
9 number might be smaller.

10 So the purpose of this call is one, to get a little
11 more clarity on what the number you think is going to look
12 like, and then to talk about how best to proceed with assessing
13 these individual claims in a timely way. Who's going to take
14 the lead here?

15 MS. BENETT: Judge, this is Megan Benett from
16 Kreindler and Kreindler. Just sort of by way of background
17 with clarification act, the attorneys who are on the call now
18 were all involved substantially in the effort and ultimate
19 modification of the act and there was a recognition that the
20 statutory language as drafted in the clarification act would
21 allow those folks with injury claims, not just the day of
22 injury claims, to participate. And the feedback we got from
23 the congressional staffers with whom we were working was that
24 the language would not change even when that was flagged.
25 However, since it was enacted at the end of last month, the VCF

1 Special Master has -- I don't know if the rules have been
2 formally issued yet, but there has been a policy change within
3 the VCF and we expect the rules to be published shortly that
4 will effectively -- will result in most of those VCF-2
5 claimants opting not to proceed with any claim with the USVSST
6 Fund. And it is those VCF-2 claimants that represented the
7 largest number of the personal injury claimants we identified
8 in our letter to the Court.

9 THE COURT: And so are those --

10 MS. BENETT: The rule change will --

11 THE COURT: So does that rule change mean that people
12 who suffered injuries but not from the day of would be
13 excluded? Is that the category of being excluded?

14 MS. BENETT: That's the category and the rule change,
15 the effect of the rule change, the VCF will consider any award
16 from the USVSST fund as an offset against a VCF award and will
17 not consider the USVSST fund award complete until the end of
18 the ten year period. And so we'll hold any VCF claim for ten
19 years before then calculating the offset. So it would be for
20 almost all of the VCF, not 100 percent, but for almost all
21 those VCF-2 claims it would not be in their interest to proceed
22 with a USVSST claim.

23 THE COURT: Got you. So can you ballpark for me the
24 number we're talking about that would be seeking a judgment by
25 mid-February?

1 MS. BENETT: For the Kreindler firm, we're not 100
2 percent sure we'll submit any but if we do it would be fewer
3 than -- it would probably be fewer than 25.

4 MS. FLOWERS: Your Honor, this is Jodi Flowers from
5 Motley Rice. Just for the record, I have to be clear that our
6 firm is not involved in the language of this change. We do
7 read it as allowing not only on the day injuries but subsequent
8 injuries. And I hear, I agree with everything Megan said but I
9 had to make that clear. And I think for us we anticipate -- we
10 have 351 on the day that we are actively going through and
11 preparing under the same set of precedents and procedures that
12 have taken place in the DC circuit with respect to injury
13 claims and we are preparing those to file just as quickly as we
14 can. I do not think it will be the full 351 on the day
15 injuries that are able to be worked up in the time frame that
16 we have but we do anticipate there will be some number. I
17 would estimate maybe 100. We know for certain that there are a
18 few that are sort of already worked out. So those we would --
19 and we can certainly tell you in more real time as we work
20 through them how many. We can modify our number. So that's
21 sort of one set that we would put to one category, the people
22 injured on the day.

23 I think the more difficult issue is really the folks
24 that Megan was referencing that got sick later and that's where
25 my personal view is that test cases would be helpful so that we

1 are able to advise people better and people are better able to
2 make decisions about whether or not they can prove causation
3 and whether or not it's worth their time, or at least would
4 help us advise them about their rights beyond the day of. And
5 with that, I'd really like to ask John Eubanks if he has
6 anything else to add.

7 MR. EUBANKS: Your Honor, this is John Eubanks from
8 Motley Rice. I guess one of the issues, and it's something
9 that Ms. Benett flagged a few minutes ago is that for those who
10 were already paid, for example, on a recognition VCF-2 claim,
11 the Special Master of the VCF has announced that they will have
12 to make a notice to the fund that they were seeking a
13 collateral offset payment from the US Victims of State
14 Sponsored Terrorism Fund. What that means is not particularly
15 clear from the Special Master's guidance. It could mean that
16 they're seeking a claw back of past paid funds and possibly a
17 garnishment of the new award. It could mean that they're
18 waiving that right but the fund does reserve that right. So
19 that's one of the things that is causing us to say while we
20 have 351 day of injuries, we may have a significantly smaller
21 universe because while they may have filed with the VCF-1, they
22 also have VCF-2 related injuries that have been contemplated or
23 that are in the process of being contemplated and therefore may
24 not want to impair their rights vis-à-vis the VCF by pursuing
25 it. So that's another issue that were trying to get to the

1 bottom of at the present time which is why we can't give a
2 definite number of how many claims that we're trying to proceed
3 on.

4 THE COURT: Okay. When Ms. Flowers mentioned the
5 idea of test cases and that that might be helpful, are you
6 suggesting that test cases would run and be decided before the
7 mid-February deadline?

8 MS. FLOWERS: Yes --

9 THE COURT: And how do you --

10 MS. FLOWERS: I'm sorry, this is Jodi Flowers. And I
11 don't know that it could be done with the Court's current work
12 load without the assignment of someone assigned just to that
13 task. Yes, we suggested a Special Master because I do think it
14 would be a full-time job for one person to do. Say there are
15 100 claims and we're able to get them in by January 15th by some
16 act of God, then that Special Master would have what, one
17 month? I don't -- you know, we could --

18 THE COURT: Well, a Special Master would have less
19 than one month because if you want judgments in hand, they need
20 to get to the Court. I mean eventually the Court needs to
21 enter a judgment potentially on the, you know, on the
22 recommendation and advice of a Special Master, but the Special
23 Master obviously can't enter a judgment.

24 MS. FLOWERS: Right. And so how much time will that
25 take? There is some serious question about whether it can be

1 done in time. But we feel that our obligations under the law
2 are to attempt to do so.

3 THE COURT: Okay. So you say -- and you don't know
4 how many people would fall in that category because that's not
5 the day of people.

6 MS. FLOWERS: This is Jodi Flowers again. I would
7 anticipate that we would not want to do more than maybe five
8 test cases, try to pick exemplars if you will, a cancer case,
9 you know, one of the, you know, a different injury type case
10 and put them before a Special Master to see whether or not or
11 how the Court is going to interpret the case law.

12 THE COURT: Right. I mean --

13 MS. BENETT: Sorry, this is Megan Benett and Andrew
14 Maloney joining in again because I accidentally hung up.
15 Sorry.

16 THE COURT: I mean one of the, in preparing for
17 today's conference, one of the thoughts was whether or not
18 these claims could be broken into categories. I mean I think
19 it needs to be slightly more nuanced than a person is sick.
20 You know, I think there's shades within that category. And so
21 you know, one idea I had was coming up with categories, maybe
22 there are 10 or 20 categories, and then within each category
23 there are exemplars, you know, maybe five exemplars. And then
24 those would be evaluated on the merits to give us some sense of
25 range which we then could apply to everybody within a category.

1 Because even if you have test cases --

2 MS. FLOWERS: This is Jodi Flowers --

3 THE COURT: Even if you have test cases, let's just
4 say, you know, you're able to get to some Special Master by the
5 second week of January, test cases, you know, and just let's
6 assume that you're able to put on evidence and have this
7 adjudicator, whether it's me or a Special Master, say okay,
8 I've heard these five cases and I think the proper number is X
9 and Y for another and Z for a third. That then needs to be
10 applied to the group and the group is nuanced. And so I guess
11 all that's to say, you know, that the test cases is only part
12 of the process because in order for the test cases to have
13 meaning, they need to be representative of categories and then
14 we need to evaluate whether or not claimants fall within the
15 appropriate categories and assign them damages based on test
16 cases.

17 Have any of these people been through any claims made
18 process yet which is to say has any of them been awarded
19 anything by either the 9/11 Fund or any of these other funds?

20 MS. BENETT: This is Megan from Kreindler. Yes. So
21 for our clients, almost all of them have gone through either,
22 and I believe all of them, have gone through and received
23 compensation from either the VCF-1, those are the day of injury
24 cases, or VCF-2 for the more chronologically remote health
25 injury cases. But the process there is it's all governed by

1 scheduled injuries. So once you establish your presence at
2 Ground Zero and have one of the qualifying medical conditions,
3 the compensation is set by schedule which I mean we could
4 provide to the Court or to the Special Master if that's
5 helpful. These are presumptions on this, the pain and
6 suffering, and then there are economic, then there are economic
7 loss awards.

8 MS. FLOWERS: Your Honor, this is Jodi Flowers. Can
9 I ask for a point of clarification, please? Are you
10 thinking -- I think the suggestion of breaking them into
11 categories is an excellent one and I'm wondering if you're
12 thinking about that both for the day of individuals as well as
13 the more latent injuries.

14 THE COURT: I was thinking about them for both
15 categories because it wasn't clear to me that we might not have
16 to deal with the second group. So I was assuming that we were
17 looking at tens of thousands of claims and trying to make
18 rational sense of that. It sounds like we might not be looking
19 at quite such an enormous number though I've only heard from
20 Motley Rice and Kreindler and Kreindler about what they think
21 the number looks like. And so the need to have such a
22 comprehensive schedule may be less so. I mean if we're only
23 dealing with people who were either fleeing from the attack on
24 the day of or entering into the attack on the day of, you know,
25 and it's been established that they were present that day

1 through some either prior claims made, processed, or through
2 some other way, because they're a member of the fire department
3 or something like that so we know that they came to the site.
4 You know, maybe it's slightly easier than people who are more
5 attenuated.

6 MS. BENETT: This is Megan from Kreindler. One of
7 the things -- maybe it would be helpful to get a sense from the
8 Court if -- I think for our, for example, for all of our VCF-2
9 cases we have affidavits of presence or we have proof of
10 presence. Medical causation in VCF-2 is presumed if you were
11 present and you have one of these health injuries you are
12 entitled to compensation. Would that approach be the one that
13 the Court would also adopt or would we be expected to put on
14 additional proof to establish legal causation?

15 THE COURT: I don't have an answer for you I'm afraid
16 because I don't really know exact -- I don't have a sense of
17 what you already have established. I mean are you saying --
18 nor do I know from what has been the process in other forums.
19 So are you saying that if you apply to the VCF funds and you
20 can establish presence and you can establish illness that
21 causation is then presumed in those funds?

22 MS. BENETT: This is Megan, Your Honor. Yes, that is
23 correct. If you have presence and a qualifying health injury,
24 causation is presumed.

25 MS. FLOWERS: This is Jodi Flowers. I would simply

1 answer that causation standard and review underwent a very
2 rigorous medical challenge by NIOSH and others. It's not as if
3 a bureaucrat in a room made these decisions. These were
4 qualified medical positions who came to the conclusion over
5 time that causation was established vis-à-vis the listed
6 eligible injuries. So I do think that is something that could
7 be very instructive to the Court. Obviously we have to brief
8 that to you.

9 THE COURT: Right. I mean look, if some other
10 entity, and as Ms. Flowers was suggesting, you know, rigorously
11 evaluate each of these claims previously, I think I would be
12 comfortable to rely on that. I don't know whether or not
13 everybody who's going to be applying for this February deadline
14 falls within that category. If that's true that they do fall
15 into that category, I think that's very helpful. You know, to
16 the extent that those funds have also awarded damages, I know
17 not in a judicial way, but have assessed value, I guess one
18 question that I would have is why is that not presumptively the
19 correct number? Why should the Court be coming up with a
20 different number?

21 MS. FLOWERS: Your Honor, this is Jodi Flowers. I
22 think the answer to that is also in the briefing that we would
23 have to present to you. There's a large body of law not
24 dissimilar to what is the basis for the current numbers that
25 are being awarded on injury claims in this setting. And they

1 range, based on our research to date, anywhere between 2
2 million and 12 million depending on whether you've got somebody
3 with burns over 80 percent of his body, for example, or versus
4 somebody who has a broken bone at the lower end. That's simply
5 a comment as to the on the day of.

6 With respect to the more latent injuries, the
7 cancers, the digestive disorders, we can begin to group those.
8 I think that's a little bit different and probably more
9 difficult analysis.

10 MS. BENETT: Your Honor, this is Megan Benett from
11 Kreindler & Kreindler again. My partner, Noah Kushlefsky, is
12 with us as well and he handles all of the VCF-2 work. And I
13 know that on the question of causation and this grouping
14 injuries into different categories, we talked about that
15 internally, and Noah has some ideas about [inaudible] at the
16 broadest level between inhalation cases and cancer cases
17 because the proof on causation on those was meaningfully
18 different when presented and incorporated into the VCF
19 regulations and I don't know if the Court wanted to hear
20 anything more detailed about that, but Noah could speak to it.

21 THE COURT: Sure. I'm happy to hear.

22 MR. KUSHLEFSKY: Well, Your Honor, in the original
23 Zadroga Act in 2010 only upper and lower respiratory injuries
24 were included by Congress. And they did that based on the
25 science that was available at the time. And they made the

1 decision to ignore any external factor that could have
2 contributed and basically said that we know that these
3 constituents in the air caused these respiratory illnesses,
4 we're not going to get into qualitative discussion of whether a
5 person was a smoker, whether a person worked in an industry
6 that might have contributed to -- and we're not even going to
7 be concerned with whether they had the respiratory condition
8 before so long as it was exacerbated. And that was relatively
9 straightforward. They specifically excluded, Congress
10 specifically excluded cancer because of the causation issues
11 which became really mostly a political issue at the time. And
12 instead, what Congress created was the Science and Technology
13 Advisory Commission where someone could petition to have any
14 condition added over time as the science became better. The
15 cancer issue was controversial but all of the New York
16 legislators made a petition and it became apparent that there
17 was a groundswell to get cancers included. And the way they
18 got to including the cancers was really by looking at medical
19 literature to see what the constituents in the air could cause
20 and then adding those cancers. The science wasn't there at the
21 time and I don't know that it's advanced much beyond that at
22 this point. But they really used to some degree statistics but
23 mostly if, for example, jet fuel had benzene and benzene could
24 cause these five cancers, we'll include them. So they kind of
25 reverse engineered them into inclusion as a presumption again

1 ignoring any other environmental exposures, occupational
2 exposures that could have contributed.

3 THE COURT: And so it came to be that the fund then
4 allowed cancers to come in as a matter of law?

5 MR. KUSHLEFSKY: Yes. They basically through
6 regulation -- what the VCF does is it accepts what the health
7 program accepts. So the [indiscernible] commission made the
8 recommendation to the health program, the health program NIOSH
9 through regulation added them, and the VCF therefore
10 presumptively accepts them.

11 THE COURT: Thank you. That was helpful. And so --

12 MR. KUSHLEFSKY: The whole process was designed to
13 avoid having to go to court to prove it.

14 THE COURT: Right.

15 MR. KUSHLEFSKY: Oh, I'm sorry, and with respect to
16 your observation before as to whether the VCF is awarding
17 numbers that would be kind of the presumptive damages, one
18 thing that I think is important to note is that a lot of the
19 numbers in the VCF have become numbers based on policy, not
20 actual damages. For example, in VCF-1 if you had a decent
21 respiratory condition that was disabling, they paid you 125,000
22 and 90,000 for non-disabling. When VCF-2 opened, COPD and
23 bronchitis and sarcoidosis would get 90, but asthma would get
24 60, 65. When it was re-authorized, they dropped bronchitis and
25 COPD and asthma and all other upper respiratory conditions down

1 to 20,000. So you have people who have identical conditions,
2 identical severity, identical age, et cetera. One of them got
3 125 and one of them got 20. So it's very difficult to look at
4 those numbers as having any real bearing on actual damages.

5 THE COURT: Okay.

6 MS. FLOWERS: This is Jodi Flowers. I agree with
7 that. I would simply add that I do think there's guidance in
8 the context of the anti-terrorism laws and FSIA that does give
9 sort of a different set of damages for the Court to consider.
10 And we have not a lot of clients but quite a hearty handful of
11 vociferous clients who really had never, for whatever reason,
12 either did not seek medical treatment within the 72 hours
13 required in the first VCF because they were in shock or they
14 didn't do well at all in the second for whatever reason but who
15 are seriously and severely disabled who've never been able to
16 recover much at all. And I think those are probably -- I don't
17 know how much the Court -- I guess I would ask for the Court's
18 guidance about how much you believe that information is
19 relevant to your decisions here.

20 THE COURT: Right. So these are the people who did
21 not apply for the VCF?

22 MS. FLOWERS: This is Jodi again. No, people that
23 perhaps did apply but got \$20,000 or something like Noah was
24 suggesting, but have since developed severe conditions and not
25 gone to VCF-2 for whatever reason.

1 THE COURT: Okay. This is obviously hugely
2 complicated. Let me -- you had mentioned briefing. I guess,
3 you know, I mean we are obviously engaged on this issue and we
4 will do our very best to be as accommodating as we can. And it
5 may be that it makes sense for there to be a Special Master to
6 handle all of this. I know you recommended two people. Have
7 you been in touch with both of those people?

8 MS. FLOWERS: This is Jodi. Yes, we have.

9 THE COURT: And both I assume would be available to
10 work in January?

11 MS. FLOWERS: Yes, Your Honor.

12 THE COURT: Okay. Does it make sense for you to
13 brief all this to me in whatever short fashion you can do it
14 and so we can come up with -- and give me a recommendation of
15 how you think we should proceed? I mean you all have more
16 information than I do. This is been a very helpful conference
17 for me. But I think I'd like to hear from you on what you
18 think is the most efficient way to proceed and what you think
19 the Court can rely on, what assumptions and presumptions the
20 Court can accept and think about whether or not we should be
21 sending test cases to a Special Master or whether they should,
22 if they're not that many of them, maybe they can come to me. I
23 guess again we don't know exactly what numbers we're talking
24 about here.

25 MS. FLOWERS: Your Honor, this is Jodi Flowers again.

1 I think that's right, we don't know the numbers, but I can tell
2 you that as we work on this each day the numbers are going
3 down. The numbers we presented to you in a letter were in
4 broad strokes here are the most we think are possible. And
5 that is coming down. And so that has had me at least asking
6 that same question you just post about will we need a Special
7 Master after all? Maybe that's something we cross, a bridge we
8 cross when we get there. I do think a briefing on the sword of
9 the state of personal injury damage claims under the FSIA is an
10 appropriate brief to present to you as well as the factual
11 underpinnings that we've touched on today with respect to the
12 different eligibility determinations and causation issues that
13 have already sort of preceded where we are today. I don't know
14 if it makes sense to do that all in one brief or if we should
15 do a brief on the damages, a separate brief on causation. I do
16 think the eligibility piece is the easiest lift because if
17 these people went to either fund they've been deemed eligible,
18 they are who they say they are. But I guess I'd ask for the
19 Court's guidance if you'd rather have it all in one brief or if
20 we can chop it up a little bit. For example, on the damages
21 piece, if they could get it to you sooner, I would like a
22 little more time particularly with my co-counsel to confer on
23 the causation piece. But if you want it all at once, we'll
24 make it happen.

25 THE COURT: I guess that in the damages piece it's a

1 little cart before the horse. I'm not quite sure what I would
2 do with that information without having a better sense of how
3 we're going to be evaluating these claims. So tell me why you
4 think, other than it's easier for you why you think getting me
5 the damages component advances this conversation without the
6 rest of it.

7 MS. FLOWERS: Your Honor, that was simply because
8 we've done that work up.

9 THE COURT: Okay. That's a good answer.

10 MS. FLOWERS: Absolutely. But we absolutely can put
11 it together with the others so you don't have to read more than
12 one paper.

13 THE COURT: Right. I mean there's that but more
14 importantly I just -- I'm trying to get sort of a big picture
15 here and I worry that if I get half of it and it's sort of the
16 second half, meaning the damages, without an understanding of
17 how we get there, it's going to be more confusing than not.

18 MS. FLOWERS: Agreed.

19 THE COURT: So why don't we set a deadline for a
20 submission that includes I think history as you put it of these
21 different funds and what people have gone through and what has
22 been established for these claims meaning, you know, I thought
23 it was helpful for me to understand that in certain funds
24 already if you establish presence and you've establish a
25 qualifying health injury that's sort of the end of the story.

1 It would be helpful for me to know which regimes have adopted
2 that practice and then among the claimants how many of them
3 have already been sort of certified as it were. If many of the
4 people that we're talking about here have been certified by
5 some other authority, then I have much greater confidence in
6 moving into the damages phase. My concern before this call was
7 that all of that was going to be something that the Court had
8 to take on in the first instance. You know, were you actually
9 there? Are you actually injured? And if that is happened,
10 then the bite is a lot smaller. So whatever information you
11 can provide to me about the different regimes, who's been
12 through these regimes, whether or not all of the anticipated
13 claimants have been through these regimes, and what they have
14 adopted and established. And then I think the damages
15 information which I think would include at least the
16 information that -- Noah, I'm forgetting your last name,
17 apologies, but Noah was explaining about the different damages
18 awards and how it sort of diminished over time because of
19 policy consideration and then what other either cases or
20 regimes the Court could look to to establish appropriate
21 damages to these claimants. And then, you know, what your
22 recommendation is to actually get through this process by mid-
23 February. And again, if everybody or nearly everybody that's
24 going to be submitting a claim has been, I'll use the term
25 certified, and the question is really what sort of damages

1 should be awarded in the context of this terrorism case, I feel
2 much more comfortable doing that rather than having to get a
3 Special Master involved. By contrast, if we need to establish
4 that these people are even entitled to damages, then that's
5 more complicated.

6 And then the last thing I'll say, because this came
7 up in some of the other cases, is I'm not going to issue
8 judgments for people who are not plaintiffs. I just want to
9 make that clear. This happened a couple of months ago. So
10 anybody who wants a judgment from the Court needs to be a
11 plaintiff in this case. And so to the extent anyone hasn't --

12 MS. BENETT: This is --

13 THE COURT: Yes, Ms. Benett?

14 MS. BENETT: Sorry, this is Megan. So to make sure I
15 understand, this is just a question of people who had not been
16 added by notice of amendment to the suit against Iran, any of
17 the suits against Iran, but moved for judgments nevertheless?

18 THE COURT: Correct. We had a situation, there were
19 a series of court orders. I don't believe there were any of
20 your clients I think. But there were a series of judgments
21 that were entered in other cases where the lawyer was sort of
22 assuming that, for instance, a family member, even a legitimate
23 family member, a spouse, would be able to get a judgment even
24 though the only party in the action was the estate. And by my
25 read of the law, you can't get a judgment without being a

1 party. And so I just want to make that point explicit because
2 we had that issue in September and I don't want to have to deal
3 with that a second time. So if any of these however many we're
4 talking about claimants are not parties in an action against
5 Iran that are seeking a judgment against Iran, they need to
6 file a notice of amendment make sure they're in the case. And
7 so that's just another procedural layer that needs to be taken
8 care of in advance of any request for a judgment.

9 MS. BENETT: This is Megan. Understood. We had one
10 question. The Court uses the word certification and we weren't
11 sure if that is meant as a proxy for causation in the way that
12 the word is being used meaning that if -- it seems to me at
13 least that it would be for the Court to decide ultimately
14 whether being, for example, eligible for payment from the VCF,
15 which is different than being certified within the VCF is a
16 qualifying injury along with presence, but whether VCF
17 eligibility will suffice. I mean I think that's ultimately --
18 the Court is going to have to make that decision if the
19 presumptions satisfy whatever causation requirement are
20 demanded in order to get a judgment. But when the Court
21 says -- so I guess the question was since the Court already
22 reached a decision or is inclined towards a decision that
23 certification -- sorry, that eligibility or certification with
24 the VCF would establish causation. Or is that what you want
25 to -- I mean we can address what the requirements for

1 certification and for eligibility, but we just weren't sure if
2 that was being used as a proxy for legal causation or damages
3 judgment before the Court.

4 THE COURT: I'm not sure I understand what you just
5 said but --

6 MR. KUSHLEFSKY: Judge, this is Noah Kushlefsky. If
7 I can just jump in. So what you can pull from eligibility of a
8 victim compensation fund is they have very strict proof of
9 presence requirements. So a determination that someone is
10 eligible for the VCF I think should ultimately satisfy the
11 Court that the person was present and has the requisite
12 exposure to potentially tie any illness or injury to that
13 exposure.

14 The next part is certification for the injury is
15 simply that they meet the exposure and they certify the injury
16 as eligible for compensation. The compensation part takes the
17 leap that they presume the causation and therefore are
18 compensated. When Your Honor was describing certification, the
19 question was whether you were saying --

20 THE COURT: Yeah, no, I get you, I get you.

21 MR. KUSHLEFSKY: -- [inaudible] VCF eligibility.

22 THE COURT: I understand. I was not using the word
23 certification to mean anything of any particular legal
24 significance. What I expect is that in this brief that we're
25 discussing that the lawyers would set forth for me all of the

1 sort of bureaucracy that happens in these funds. So this is
2 what you need to establish. This is the type of review and
3 this is how the funds sort of make decisions, and to let me
4 know that these category of people have already been through
5 this process and have been found to be eligible and what that
6 eligibility actually means so that I can then say to myself all
7 right, if it's good enough for this fund, is it good enough for
8 the Court? So when I was talking about certification, I didn't
9 mean for it to have any greater legal significance by
10 appropriating a term that's used in the VCF process. I want
11 you to educate me on that process, educate me on what a
12 claimant would be to do to establish recovery and whatever
13 legal conclusions the funds have made. So presence, you've
14 explained to me that as long as somebody can establish presence
15 and establish a qualifying health injury, that's enough, and
16 therefore, they can move on to get a damages recovery. And so
17 I'd like you to explain to me what that process is so I can get
18 a sense of how rigorous it is and whether or not it's
19 satisfactory to me. It may be that based on my review if
20 somebody has gone through the process and has been deemed
21 eligible for funding, that that may be enough for me too.

22 MS. FLOWERS: Your Honor, this is Jodi Flowers. I
23 just wanted to add that for our cases, our 351 that we referred
24 to earlier, they are all plaintiffs in the litigation and they
25 are also already were on our default motion. So they've got

1 the liability default.

2 THE COURT: Good. So let's talk about dates.

3 MS. FLOWERS: Okay.

4 THE COURT: Today is the 13th of December. I
5 recognize that a significant holiday is coming up, many of
6 them. Do you want to get me something by very early January or
7 do you want to try to get it to me sooner?

8 MS. FLOWERS: Your Honor, this is Jodi Flowers. My
9 personal preference would be early January.

10 MS. BENETT: No objection from the Kreindler side.

11 THE COURT: What if we said Monday, January 6th? Do
12 we think that's going to be enough time?

13 MS. FLOWERS: Yes.

14 MS. BENETT: Yes.

15 THE COURT: Okay. And I'm assuming this is going to
16 be one submission.

17 MS. FLOWERS: Correct.

18 MS. BENETT: Yes.

19 THE COURT: So let's say Monday, January 6th. With
20 respect to the Special Master, I'm not sure what to do because
21 I don't know what you're going to tell me. And so I don't know
22 whether or not you want to be in touch and, you know, obviously
23 those people have professional lives and need to know whether
24 or not they're going to be engaged or not. I guess I'm at a
25 loss as to what we should do with respect to those people.

1 MS. FLOWERS: Your Honor, this is Jodi Flowers.
2 Would it make sense between now and January 6th, because we're
3 going to know a lot more each day frankly about our numbers,
4 to -- and I do believe it's just the Kreindler firm and the
5 Motley Rice firm who are at issue here. I don't believe the
6 O'Neill plaintiffs who are on the phone are having to bring
7 this round and I'm not aware of anyone else who is. As I look
8 at it, I think that that is a little bit fluid and I would
9 suggest that we try to get to you something on that before
10 January 6th.

11 THE COURT: I think that's a great idea.

12 MS. FLOWERS: So that we can --

13 THE COURT: I think that's a great idea. Could we
14 get a status letter maybe the end of next week?

15 MS. FLOWERS: Yes.

16 THE COURT: So let's get a status letter on the 20th,
17 and that status letter should give me a sense of where we think
18 the numbers are. I'm not going to hold anybody to it but where
19 we think the numbers are. And to the extent you want to
20 preview what you think you're going to propose to the extent
21 you know, maybe you don't, so I don't need to have the sort of
22 background, but if you think you're going to be able to --
23 you're going to propose, you know, that there are going to be
24 150 claimants and you think that you can have me look at 20 and
25 make decisions from there, for instance, that might be a

1 helpful thing for me to know. And you know, a scenario like
2 that I think I can do without having to engage a Special
3 Master.

4 MR. EUBANKS: Your Honor, this is John Eubanks from
5 Motley Rice. Would it behoove the Court if, for example, we
6 have a certain number of claims prepared to be submitted in a
7 form that could be adjudicated by Your Honor then between now
8 and that January 6th time period that we submit those for your
9 consideration so that you have an idea of what you're looking
10 at in addition to the status letter to kind of get a better
11 idea as to how many number -- what the numbers look like going
12 forward?

13 THE COURT: That's fine. I too will be acknowledging
14 the upcoming holidays so I don't know how much between December
15 20th and January 6th I'm going to be able to do on this case as
16 compared to other cases that I intend to be working on over
17 those holidays. But if you have them and you want to submit
18 them, we're not going to bounce them.

19 MS. BENETT: This is Megan Benett at Kreindler. I
20 have one last question that is semi-related to -- well, it
21 relates to the proposed order we are set to submit on Monday.
22 I gather that we can pull off the list [inaudible] the order on
23 the personal injury cases.

24 THE COURT: I'm sorry, what?

25 MS. BENETT: I think the Court had directed us to

1 submit proposed uniform judgments that were going to be used
2 going forward before the next USVSST deadline in connection
3 with solatium, estate, and personal injury --

4 THE COURT: Yes.

5 MS. BENETT: -- motions for a final judgment.

6 THE COURT: Yes.

7 MS. BENETT: Should we hold off on the personal
8 injury form until after these questions have been addressed?

9 THE COURT: I think so. I don't have that order in
10 front of me. I consider the solatium claims personal injury
11 claims. So those we want to have covered. But I think these
12 sort of direct personal injury we should hold off on.

13 MS. BENETT: And on the -- I just wasn't sure if the
14 Court on the estate claims has updated all of the economic loss
15 figures for our clients we have the original economic loss
16 numbers and the volume of what we would be submitting to the
17 Court in support of our motion for those estate claims are
18 going to be pretty substantial because it's the 400 original
19 economist reports by 400 some updated calculations. And I
20 wasn't sure if the Court might prefer that we submit those by
21 disk or this is something that we should address in whatever we
22 file on Monday.

23 THE COURT: I don't think our computers take disks
24 anymore so I'm not sure that's a good solution. I'm being told
25 they do. I guess probably that makes sense. I don't want to

1 crash the system any more than it already crashes when we
2 opened up this case.

3 MS. BENETT: Yeah. Indeed, indeed.

4 THE COURT: Right. And again, we need you to help us
5 help you as it were. And so the more uniformity where we can
6 sort of be looking always in the same place for the relevant
7 information, that's what we want. So I'm not looking for
8 pretty prose. I'm looking for like something that we can sort
9 of go through, satisfy ourselves that we're doing the right
10 thing, but we can't possibly be reading thousands and thousands
11 of pages of submissions. And so whatever you can do -- which
12 is why we wanted the exemplar proposal so that we at least can
13 sort of agree on some simplicity here.

14 MS. BENETT: Got it.

15 MS. FLOWERS: Your Honor, in terms of -- this is Jodi
16 Flowers. In terms of the personal injury cited, we have
17 thought about that form obviously and the form is a short
18 affidavit from the injured person telling their story.

19 THE COURT: Okay.

20 MS. FLOWERS: But I don't know based on our
21 conversation today I'm not sure that you need that Monday. I
22 think it makes more sense to me to include it in the January 6th
23 filing but we will do what helps the Court the most.

24 THE COURT: I don't think I need that before then.

25 MS. FLOWERS: Okay. Thank you.

1 THE COURT: Right. And I guess I assume a lot of
2 those affidavits have already been prepared. To the extent
3 they have not been prepared, you know, I would just urge you to
4 have a sort of just the relevant facts in these affidavits.
5 Nobody's going to -- I don't think anybody's claim is going to
6 be adjudicated based on how descriptive or how many adjectives
7 anybody's using here. You know, we want to just sort of try
8 and get as much objective information as possible.

9 MS. FLOWERS: This is Jodi Flowers. Understood, Your
10 Honor. And we will certainly do that. I'm going to warn you
11 about the exception of one client that I simply can't
12 control --

13 THE COURT: Understood.

14 MS. FLOWERS: -- who wants to write her book, but I
15 will cut it way back.

16 THE COURT: Understood. I was a lawyer before I was
17 a judge.

18 MS. FLOWERS: Okay. Thank you.

19 THE COURT: Okay. So I think we have a plan. So I'm
20 going to hear from you on this issue that we've been discussing
21 for the last hour on the 20th with an update status letter. And
22 then we will get a brief with a recommended course of action by
23 January 6. And we will anticipate that January 6 motion and be
24 ready to act on it right away. All right? Anything further
25 from anyone?

1 MS. FLOWERS: Thank you, Your Honor.

2 THE COURT: All right. Well, thank you all for
3 making time this afternoon on short notice and I wish everybody
4 a happy holiday season.

5 MR. KUSHLEFSKY: Thank you, Your Honor.

6 MS. FLOWERS: Same to you. Thank you.

7 MS. BENETT: Thank you, Your Honor.

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

4
5 *Mary Greco*

6 _____
Mary Greco

7 Dated: December 29, 2019
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